In the United States Bankruptcy Court
for the
Southern District of Georgia
Augusta Division

In the matter of:	)	
	)	Chapter 11 Case
RICHARD EUGENE BAILEY	)	
	)	Number 90-11303
Debtor	)	

MEMORANDUM AND ORDER ON APPLICATION FOR COMPENSATION OF COUNSEL THOMAS R. BURNSIDE, JR.

The above Application was considered by the Court on February 4, 1992. At the time of the hearing all objections were resolved to that portion of the attorney's fee application which seeks compensation at hourly rates ranging from $125.00 per hour to $85.00 per hour for various members of the applicant's law firm. Accordingly, I entered an Order on February 4, 1992, authorizing interim disbursement of the sum of $22,961.50 to the firm Burnside, Wall, Daniel and Ellison. Counsel, however, requested the Court to consider whether the fee should be enhanced and whether counsel should be paid at a figure higher than the lodestar rate based on the contention that the results obtained by counsel for the Debtor were exceptional. That request was opposed by the Debtor and after consideration of the evidence and applicable authorities I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed this Chapter 11 case on August 6, 1990. The principal reason Debtor was forced to seek relief was that he had suffered economic reversals arising out of condemnation proceedings in which Columbia County, Georgia, was taking a portion of his business real estate for use in the construction of an adjacent public road.

Prior to the filing of this case Debtor had been offered the sum of $81,180.00 by Columbia County, Georgia, the condemning authority. He had refused that offer and had been verbally informed that the County would increase its offer by ten percent to a total of approximately $90,000.00.

On March 29, 1990, Debtor employed the applicant's predecessor firm Burnside, Wall and Daniel under a contract providing that the firm would be compensated at one-third of any recovery above the $90,000.00 which had been offered plus out-of-pocket expenses. Following the filing of this case Debtor sought to continue the employment of the Burnside firm and this Court entered an Order dated December 3, 1990, authorizing the firm to continue to represent Debtor in the condemnation proceeding at a rate of $125.00 per hour for Mr. Burnside's time and $100.00 per hour for associates.

In that Order the following language appears:

> The Court reserving the determination of final attorney's fees and expenses and the determination of any requested adjustment to the 'lodestar' fee for later ruling by the Court.

That language was inserted in recognition of the fact that compensation to counsel was necessarily contingent on a successful outcome and pursuant to the authority of Norman v. The Housing Authority of the City of Montgomery, 836 F.2d 1292 (11th Cir. 1988).

After a three day trial a jury found that the property condemned had a value of $385,000.00. The condemning authority appealed that judgment, the appeal was subsequently dismissed on procedural grounds, is now a final judgment, and the monies pursuant to that award have been paid. From the evidence introduced at the hearing it was established that expert testimony given during the trial consisted of two county-hired appraisers who valued the property at approximately $81,000.00 and $91,000.00, a witness called by Decatur Federal Savings and Loan Association, the first mortgageholder of the real estate, who testified the property to be worth $300,000.00, testimony of Debtor's expert who found a value of $475,000.00 and Debtor's testimony as to value of $650,000.00.

Of considerable help to the outcome of the case apparently was the fact that testimony of one of the county's appraisers was impeached when counsel for the Debtor produced a written appraisal which he had prepared on the eve of trial indicating just

compensation for the property to be $378,200.00. (Exhibit "D-1"). Since the witness testified at trial that the value was approximately $91,000.00 it is obvious that the jury reacted adversely to the County's case and believed Debtor's witnesses to be far more credible. The identity of this individual had been made known to Debtor's counsel by the Debtor because of conversations with the witness at the time of his visit to the premises. Debtor's counsel forced production of the written appraisal completed after that site visit, through normal discovery.

Uncontradicted testimony before me established that for attorneys of Mr. Burnside's professional skill, reputation and experience in commercial litigation in the Augusta area the prevailing rate is $175.00 per hour. It was further testified by Debtor's expert witness, David Hudson, a knowledgeable and respected attorney in Augusta, that although the Burnside firm was to be compensated at $125.00 per hour under the terms of my order there would, in fact, be no compensation in the absence of successful recovery. Therefore, the firm was working on a contingent fee basis to some extent regardless of the hourly rate stated.

Hudson characterized the results obtained of a $385,000.00 following an $81,000.00 offer to be exceptional and deserving of enhancement under the authority of Norman, supra. Hudson, in consideration of the current going rate for attorneys of Mr. Burnside's reputation, skill and experience, adjusted the hourly rate from $125.00 to $150.00 and tripled the fee based on the results obtained arriving at an opinion that his services were

worth $70,000.00.

The fee to which the Burnside firm would be entitled, if it were compensated as provided for in its contract (Exhibit "P-1") would amount to $108,212.00. The litigation was carried on in the county where the condemnation occurred and the jury sitting on the case was made up of taxpayers who ultimately would bear the burden of whatever award was made. In addition, from the time of the filing of this case until the recovery approximately eighteen months have elapsed during which time counsel has not been compensated.

The Debtor stated that in his opinion the results obtained were excellent but not exceptional and under the Norman case no enhancement would be called for. He based this conclusion on the fact that the jury awarded an amount which was approximately 77% of the figure testified to by Debtor's appraiser. While recognizing the award was far higher than the only offer made by the condemning authority, which was $90,000.00, Bailey asserts that the enhancement resulted from the discovery of the document with which Debtor's expert was impeached and that he had assisted counsel in learning the facts which led to the discovery of that document.

CONCLUSIONS OF LAW

11 U.S.C. Section 330 provides that after notice and a hearing the Court may award "reasonable compensation for actual, necessary services rendered by such . . . attorney . . . based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title."

Under Section 330 the time spent on services is only one of several factors to be considered. However, under the Norman decision many of the additional factors, other than time, of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), have been subsumed into the lodestar analysis. The lodestar fee is arrived at by calculating a reasonable hourly rate for an attorney of comparable skill, experience and reputation times a reasonable number of hours. As previously set forth in this Order that calculation yielded a fee of $22,961.50.

The Debtor has obvious concerns that the cost of legal services to the estate be minimized. This sentiment is understandable and is surely shared by all of his creditors. However, Section 330 provides specifically that compensation awarded in bankruptcy cases is to be comparable with services rendered by attorneys handling matters of similar complexity in a non-bankruptcy setting. The former concept that fees be awarded with a view toward economy and saving of costs to the estate was rejected by the adoption of the Bankruptcy Code which recognized that such savings are illusory. Under current concepts, the failure to compensate counsel representing debtors and others in bankruptcy cases at rates comparable to non-bankruptcy work results in inferior quality representation with the

ultimate result that the administration of bankruptcy cases is made less efficient and more costly. *See* Collier ¶330.05 at 330-61.

Clearly, in a non-bankruptcy setting the Burnside firm would have earned a fee of $108,212.00. Under a pure application of the lodestar test the fee would remain at $22,961.50. Notwithstanding the fact that its fee recovery was essentially contingent the Burnside firm agreed to work at an hourly rate subject to the Court's consideration of enhancement and accordingly I will not award compensation based on a straight contingency. 11 U.S.C. Section 328, however, provides that the Court may approve employment of an attorney on any reasonable terms and conditions. Notwithstanding those terms and conditions "the Court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment if such terms and conditions prove to have been improvident."

In light of the testimony that an appropriate hourly rate in this case for comparable counsel would be $175.00 I find the terms of employment to have been improvident. No evidence as to an appropriate rate was taken at the time of Burnside's employment and the rate was set based on the prevailing rate in this District for debtors' counsel. However, for special counsel to a debtor the prevailing rate allowed for general services to a debtor is not necessarily controlling. I find the lodestar rate should be increased to $175.00 per hour. Burnside spent a total of approximately 114 hours on the case. A $50.00 per hour increase in the lodestar rate results in an increased fee of $5,700.00.

I further conclude that enhancement of the lodestar fee is appropriate in this case. Under Norman enhancement shall not be made if results are "excellent" because such results are to be expected if an appropriate hourly rate is paid and competent counsel are engaged. Rather, enhancement is only appropriate where the results are exceptional. I find, contrary to Mr. Bailey's contention, that the results in this case were exceptional. Mr. Bailey would have been content at the outset of this case to pay $108,000.00 for these services and now, through the employment of this Court's duty to regulate fees, seeks what amounts to a windfall. Because of the mandate of the Norman decision and the fact that the Burnside firm agreed to work on an hourly basis I will not award fees based solely on the pre-bankruptcy contract, but to the extent the fee awarded to the Burnside firm is anything less than $108,000.00 the Debtor and his creditors will still have realized a benefit and should not be heard to complain that the fee is excessive.

In this case the Debtor was litigating before a jury that could be expected to be somewhat unsympathetic if not hostile to his efforts to obtain an award as much as 800% higher than what the county had offered. Given the obvious economic impact on the county whose taxpayers made up the jury, the fact that the jury awarded a figure substantially higher than the county's experts testified to, and a figure which exceeded the testimony of Decatur Federal's expert by $85,000.00, I conclude the result to be "exceptional" as contemplated by the Norman court. Clearly the jury disbelieved the testimony of one of the state's experts who was so effectively impeached and the jury awarded a figure very close to that expert's prior written appraisal. Nevertheless, both that

expert and the county's other expert had placed a much lower value on the property. Decatur Federal, which was acting in concert with and in support of the Debtor, had produced an appraisal of $300,000.00. The jury could very easily have seized on that figure as coming from perhaps the most disinterested witness and awarded compensation that would have represented an utter rejection of the county's expert's testimony. In my judgment, to have convinced a jury to accept the median appraisal of $300,000.00 and award a figure $210,000.00 higher than the condemning authority's final offer would probably qualify as an exceptional result.

In this case, however, Burnside accomplished more. I hold that the amount by which the jury award exceeded the $300,000.00 figure was unquestionably an exceptional result. Therefore, and in consideration of the likelihood that compensation at the hourly rate might never have been recovered had the case not been successfully prosecuted I believe it is appropriate to award a fee which recognizes both the exceptional result and the contingent nature of the fee. Debtor agreed to a one-third contingency fee as to any recovery in excess of $90,000.00. Certainly as to the portion of the jury award which I find to be exceptional a comparable percentage should apply. I therefore order an enhanced fee be paid to the Burnside firm in the amount of one-third of that amount which represents the exceptional portion of the jury's award or $85,000.00. Enhancement of the fee award is therefore ordered in the amount of $28,333.33, in addition to the $5,700.00 increase based on the adjustment in the hourly rate.

IT IS HEREBY CONSIDERED, ORDERED, ADJUDGED AND DECREED that $34,033.33 be disbursed from that special interest bearing account created at the Nations Bank in the name of Burnside, Wall, Daniel and Ellison and McCurdy & Candler, as attorneys for Richard E. Bailey and Decatur Federal Savings and Loan Association, respectively, pursuant to an order of Lamar W. Davis, Jr., Judge, United States Bankruptcy Court, dated October 21, 1991. Members of said law firms who are authorized signatories on said account are hereby authorized and directed to disburse said sum of $34,033.33 to the firm of Burnside, Wall, Daniel and Ellison without further delay.[1]

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of February, 1992.

[1] In entering this Order I have considered the "Response" of Decatur Federal filed February 14, 1992. That response was not timely asserted at the hearing on February 4, 1992, and as a general objection to the concept of enhancement will not be considered at this late date. To the extent it seeks allocation of the condemnation award, I will rule on that question if and when an appropriate pleading is filed, or in the context of Debtor's amended plan, if applicable.